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J. C. L. Harris & R. O. Green for Def'ts in Error
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No. 189.

IN THE SUPREME COURT OF THE UNITED STATES,

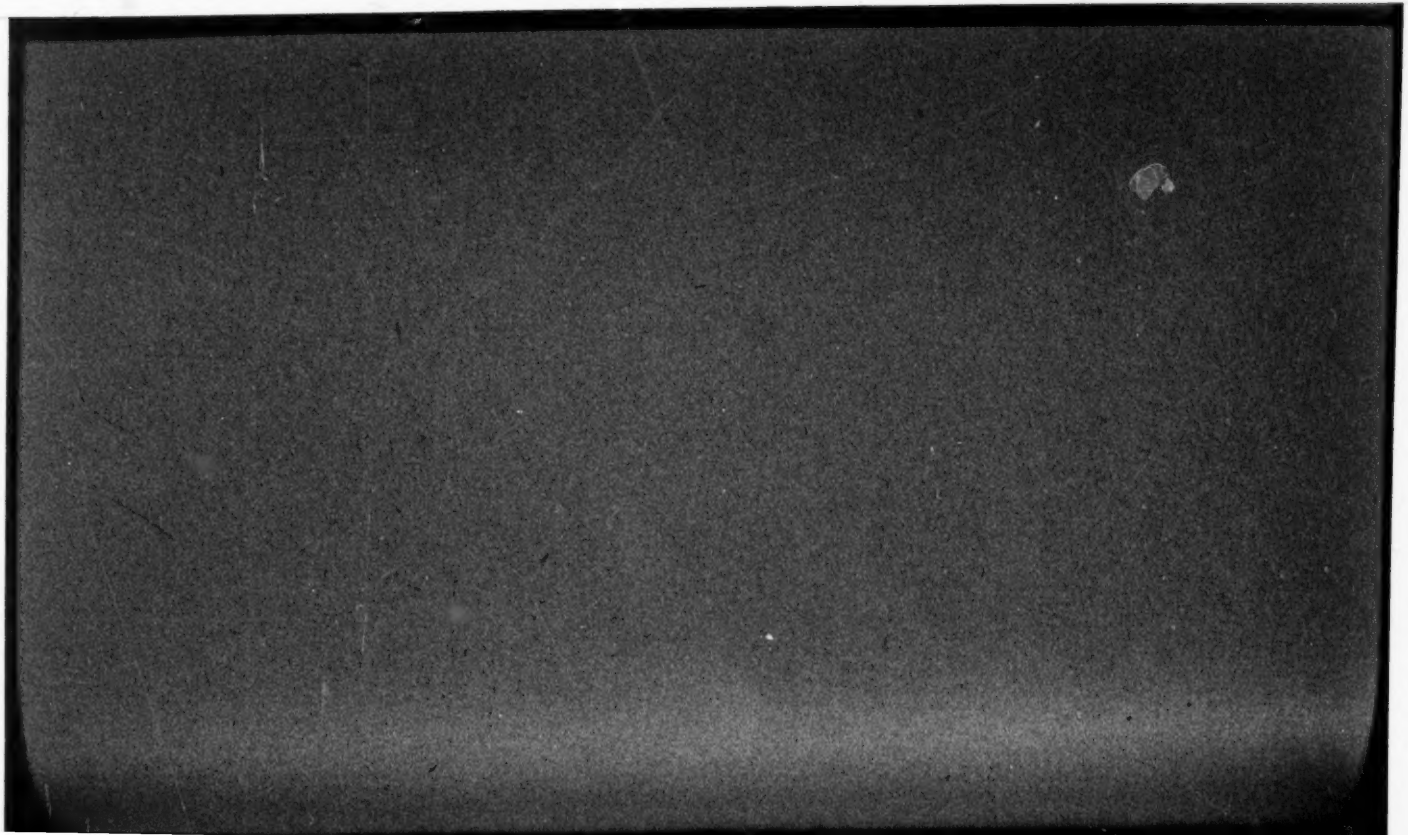
October Term, 1899.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA.

Brief of J. C. L. HARRIS and R. O. GREEN,
for Defendants in Error.



No. 189.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NORTH CAROLINA—Edgecombe County.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA.

Brief of J. C. L. HARRIS and B. G. GREEN, for Defendants in Error.

The following are the facts as shown by the record:

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor Judge Sutton, and a jury, and were convicted and sentenced to two years imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

At the time of the commission of the offense, and also at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting defendant a new trial.

At the time of the commission of the offense, and at the

time of the trial in the Criminal Court of Edgecombe County, there were two District Criminal Courts in the State of North Carolina, to-wit, the Eastern District Criminal Court and the Western District Criminal Court. In the Eastern District, in which the county of Edgecombe is situated, the State, since March 6, 1899, is allowed by statute to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial; whereas, in the Western District the State is not allowed by statute such appeal.

At June Term, 1899, of the Superior Court of Edgecombe County, appeal of the plaintiffs in error was heard and judgment awarding them a new trial was given. From this judgment the State, on July 7, 1899, appealed to the Supreme Court, and at September Term, 1899, thereof, the judgment of the Superior Court of Edgecombe County was overruled and the judgment of the Criminal Court of Edgecombe County was affirmed. See *State* v. *Mallett and Mehegan*, 125 N. C. R., at page 718.

QUESTIONS OF LAW RAISED BY THE WRIT OF ERROR.

The plaintiffs in error assign the following errors of law as the foundations for the issuing of the writs:

First. That chapter 471, section 6 thereof, of the Public Laws of 1899, is *ex post facto*, as to the offense charged in the bill of indictment, against the plaintiff in error.

The defendants in error contend that section 6 of chapter 471 of the Laws of 1899, is not *ex post facto* as to the offense charged against the plaintiffs in error:

Ex post facto laws are—

(1) Such that make an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Which aggravates an offense or changes the punishment thereof and makes it greater than it was when it was committed. (3) Which alters the

rules of evidence and requires less testimony, or different testimony, than the law requires at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3d Dallas, at bottom of page 390.

We submit that section 6 of chapter 471 of the Laws of 1899 does not make criminal that which was theretofore innocent and lawful; that it does not change the punishment which attached to the crime of conspiracy to defraud at the time said offense was committed; nor does it change the rules of evidence so as to require less testimony, or different testimony, in order to convict the plaintiffs in error.

Thompson v. Missouri, 171 U. S. Reports, p. 380.

It is well settled that statutes regulating the mode of procedure in the prosecution of antecedent crimes are not *ex post facto*, and that it is in the power of the Legislature to change the form and method of procedure in any manner which, in relation to the offense or its consequences, does not alter the situation of the accused to his disadvantage.

Encyclopædia Law (2d Ed.), vol. 12, page 533.
Hopt v. Utah, 110 U. S., 574.
Duncan v. Missouri, 152 U. S., 377.
Gibson v. Miss., 162 U. S., 566.
Thompson v. Missouri, 171, page 380.

In illustration of above proposition, we cite the following instances in which the form of procedure has been changed by law after the commission of the offenses, in which it was held that such change was not *ex post facto:*

(*a*) Finding of an indictment by grand jury of less than thirteen does not violate "Due process of law":

Talton v. Mayes, 163 U. S., page 376.

(*b*) Law is not *ex post facto* because it changes the manner of summoning and making up the jury as applied to past offenses:

Gibson v. Mississippi, 162 U. S., page 566.
Perry's Case, 3d Gratt (Va.), page 602.

(*c*) The reduction of the number of peremptory challenges allowed the accused, is not *ex post facto:*

South v. State, 86 Alabama, page 617.
State v. Ryan, 13th Minn., page 370.

(*d*) Increasing the number of peremptory challenges allowed the prosecution is not *ex post facto.*

(*e*) Permitting amendment to pending indictment:

Lasure v. State, 19 Ohio St., page 43.
State v. Manning, 14 Tex., page 402.

(*f*) Authorizing the jury to fix the punishment at the trial, which, under the law in force at the time of the commission of the offense, the Court fixed the punishment:

Holt v. State, 2 Tex., page 363.

(*g*) Making the Court the judge of the law, whereas, at the time of the offense, the jury was, is not *ex post facto:*

Marion v. State, 20 Nebraska, page 233.

(*h*) The reduction of the time within which the accused is required to challenge veniremen:

State v. Taylor, 134 Mo., page 109.

(*i*) A retrospective statute regulating the ground for challenge of jurors is not *ex post facto:*

State v. Taylor, 134 Mo., page 109.

(*j*) A statute depriving the counsel for the prisoner of the closing argument is not *ex post facto:*

In People v. Mortimer, 46 Cal., page 114.

(*k*) A statute which abolishes an existing court, or creates a new court, or confers an additional jurisdiction upon an existing court, or diminishes or enlarges the powers of an existing court, is not *ex post facto:*

Duncan v. Mo., 152 U. S., page 377.
Wales v. Belcher, 3 Pick. (Mass.), page 508.
Con v. Philips, 11 Pick. (Mass.), page 28.
State v. Jackson, 105 Mo., page 196.

For a full and complete discussion of *ex post facto* laws, see *The People and Chandler* v. *McDonald*, 5th Wyoming Reports, and as reported in 29th Lawyer's Annotated Reports, at page 834, and cases there cited. Also see

State v. Manning, 14 Texas, at page 402.
Murphy v. Commonwealth, 43 Lawyer's Annotated Reports.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court granting a defendant a new trial.

We submit that the plaintiffs are not denied the equal protection of the laws as provided by the Fourteenth Amendment to the Constitution of the United States, because the State is allowed to appeal, as hereinbefore stated, in the Eastern District, and is not allowed such appeal in

the Western District. That this attitude of the law does not deprive the plaintiffs in error of any right enjoyed by any other citizen of the State, and the plaintiffs in error have all the rights of citizens of the State as conferred by the Constitution and laws thereof. That the fact that the State has not seen proper to grant unto itself the right of appeal in the Western District, as has been allowed in the Eastern District, in nowise deprives the plaintiffs in error of any rights guaranteed to them by the Constitution and laws of the State, and therefore the plaintiffs in error are not deprived of the equal protection of the laws. *Guthrie on the XIVth Amendment, Chapter IV; Missouri* v. *Lewis, 101 U. S. R., pages 22, 31, 68.*

Special legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike:

Mo. Pacific R. R. Co. v. Mackey, 127 U. S., 205.
Minneapolis & St. L. R. R. Co. v. Herrick, 127 U. S., 210.
Duncan v. Missouri, 152 U. S., page 377.

Whenever the law operates alike upon all persons and property similarly situated, equal protection can not said to be denied:

Webster v. Nevin, 126 U. S., 578.

The Fourteenth Amendment does not prohibit legislation limited as to the objects or territory, but merely all persons subject to it should be treated alike under like circumstances and conditions:

Hayes v. Missouri, 120 U. S., 68.
Giozza v. Ternan, 148 U. S., 657.
Leeper v. Texas, 139 U. S., page 462.
Missouri v. Lewis, 101 U. S. R., at page 22.

A State is not thereby prohibited from prescribing the jurisdiction of its several courts, either as to territorial limits, or the subject-matter, or amount, or formality of their respective decrees.

Each State has full power to make, for municipal purposes, political subdivisions of its territory, and regulate their local government, including the constitution of the courts, and the extent of its jurisdiction. Each State may establish one system of law in one portion of its territory, and another system in another, provided it does not encroach upon the jurisdiction of the United States nor abridge the privileges and immunities of citizenship of the United States, nor deprive a person of his right without due process of law, nor denies to a person within its jurisdiction the equal protection of the laws in the same district:

Approved, Maxwell v. Dow, 176 U. S., 581.
Boller v. Nebraska, 176 U. S. R., bottom page 88.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter books had theretofore been seized, under an attachment by the Sheriff of Edgecombe County in a civil action, and were brought into court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

We submit that the use of the ledger book and counter book of the plaintiffs in error, as evidence against them, was not compelling the plaintiffs in error to become witnesses against themselves. These books constituted "real evidence," and because they were the personal property of the plaintiffs in error, and had theretofore been seized by the sheriff in a civil action and were in his possession at the time of the trial, and were used by the State on the trial, does not render them incompetent. A person may be compelled to put his foot in a track; stolen goods found in a person's house may be used as evidence against him.

The following opinion in the *State* v. *Graham*, to be found in 74 N. C. R., at page 646, is full and complete on this question:

RODMAN, J. The first exception is, because the Judge permitted the officer who had the prisoner in custody to testify, that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *State* v. *Jacobs*, 5 Jones, 259, is cited.

The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury and fit for their consideration.

Evidence of this sort is called by the civilians "real evidence," is always admissible and is of greater or less value according to the circumstances. In Best on Evidence, sec. 183, the following instances of its value are given: "In a case of burglary, where the thief gained admittance into the house by opening the window with a pen-knife, which was broken in the attempt, and a part of the blade left sticking in the window-frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the wound

consisted of a part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception, however, is that the officer made the prisoner put his foot in the track in order to test the resemblance It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held, that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were, will be received, provided the goods were found at the place described *Reg.* v. *Gould*, 9 C. & P., 364; *Duffy* v. *People*, 25 N. Y., 588; *White* v. *State*, 3 Heisk., 338; *Selidge* v. *State*, 30 Tex , 60.

The facts of the goods being found in the place described proves that he knew they were there, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence. Roscoe Cr. Ev., 211; *R.* v *O'Donnell*, 7 C. & B., 138 (32 E. C. L. R.); *R.* v. *Kinsey*, Id., 447; *R.* v. *Burgess*, Id., 488; *R.* v. *Rooney*, Id., 515

If an officer who arrests one charged with an offence, had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment

of paper corresponding with the wadding, have been found? If when a prisoner is arrested for passing counterfeit money, the contents of his pockets are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter?* If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face: May not the Court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime?

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during the trial?

We conceive that these questions admit of but one answer, and that is one consistent with the general practice.

We concur with the Judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoe would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

Per Curiam. Judgment affirmed.

The prohibition of Article V of the Constitution of the United States, "that no person shall be compelled in any criminal case to be a witness against himself," does not apply to the courts of any State, and is only applicable to United States Courts:

Barron v. The City of Baltimore, 7th Peters, page 243.

Fox v. Ohio, 5th Howard, page 434.

Smith v. The State of Maryland, 18th Howard, page 76.

Withers v. Buckley and others, 20th Howard, page 90.

Twitchell v. The Commonwealth, 7th Wallace, page 321.

This last point cannot be considered because the question was not raised in the Criminal Court of Edgecombe County, nor in the Superior Court of that county, as a Federal question, in that it violated the Fifth Article of the Constitution of the United States, nor was it passed on by the Supreme Court of North Carolina as a Federal question.

This Court has repeatedly held that the first eight amendments to the Constitution applied to only the Federal Courts. "And we have repeatedly held the Fourteenth Amendment was not intended to curtail the powers of the State to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life."

Maxwell v. Dow, 176, U. S. R., page 581.

The privileges and immunities of a citizen of the United States does not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government.

The first ten amendments contain no restriction upon the States, but were intended to operate solely upon the Federal Government.

Brown v. New Jersey, 175 U. S., page 174.

J. C. L. HARRIS,
B. G. GREEN,
Counsel for Defendants in Error.

No. 189.

Motion to reassign.

No. 189

Filed Dec. 28, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Motion to Assign a Later Day for Argument.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The plaintiffs in error, John P. Mallett and C. B. Mehegan, respectfully represent that on motion of the defendant in error this cause has been advanced and set down for argument on January 7th, 1901; that during the autumn just passed, counsel for plaintiffs in error, Robert O. Burton, Esquire, was ill with typhoid fever, but he confidently expected to be able to prepare the case for argument by the date assigned, January 7th, 1901. Your petitioners further represent that Mr. Burton is their sole counsel, and that he is the only person cognizant of the facts of their case and the law applicable thereto; that he has given special consideration to the case ever since it was taken by appeal to the Supreme Court of North Carolina. That owing to his long illness from typhoid fever in the autumn he has been unable to prepare a brief, as he expected to do. That attempting to resume work some weeks

ago, he was again stricken with fever, and is now prostrate in bed with a low, continued fever. That he is under positive instructions from his physician that when he shall become convalescent, he shall undertake no work for weeks, until he shall have had an opportunity to regain his strength at some health resort.

Your petitioners are unable to procure other counsel, and even if they could do so, time would not permit the preparation of a satisfactory brief in their case, which, as they are advised, involves the consideration of divers sections of the Constitution of the United States, and interesting and important questions relating thereto. The liberty of plaintiffs in error is at stake.

They respectfully ask that the case may be assigned for some day later in the term in order that they may have the benefit of their counsel's labor and attendance. Their counsel's preference is for some day early in the month of April.

Respectfully submitted,

JOHN MALLETT,
C. B. MEHEGAN,
Plaintiffs in Error.

Notice of the motion to reassign this case accepted by defendant in error, to be heard January 7th, 1901.